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In the Supreme Court of the United States

OCTOBER TERM, 1976

EARL L. BUTZ, ET AL., PETITIONERS

v.

ARTHUR N. ECONOMOU, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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The Solicitor General, on behalf of Earl L. Butz, *et al.* (the individual appellees in the court of appeals),[1] petitions for a writ of certiorari to review that portion of the judgment of the United States Court of Appeals for the Second Circuit in this case that reversed the dismissal of the complaint as to petitioners.

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[1] Due to an apparent oversight, the caption of the opinion and the judgment of the court of appeals does not include Donald A. Campbell, the Judicial Officer of the Department of Agriculture, who was named as a defendant in this action. We are informed that the court of appeals is in the process of amending the judgment to correct this mistake.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, pp. 1a-22a) is reported at 535 F.2d 688. The opinion of the district court (App. B, *infra*, pp. 23a-28a) is not reported.

JURISDICTION

The judgment of the court of appeals (App. C, *infra*, pp. 29a-30a) was entered on April 23, 1976. A timely petition for rehearing with a suggestion for rehearing *en banc* was denied on July 23, 1976 (App. D, *infra*, pp. 31a-32a). On October 14, 1976, Mr. Justice Marshall extended the time within which to file a petition for a writ of certiorari to and including November 19, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether federal government officials have an absolute rather than a qualified immunity from suit for damages based upon their performance of official duties in connection with administrative enforcement proceedings.

STATEMENT

This is a suit seeking damages of $32 million from employees of the Department of Agriculture based upon their actions in initiating and conducting, allegedly wrongfully and maliciously, an administrative enforcement proceeding for violations by respondent

of the Commodity Exchange Act. The district court dismissed the suit, holding that the employees had absolute immunity from suit for acts done as part of their official duties. The court of appeals reversed, ruling that the employees' immunity was only qualified, not absolute.

1. Respondent Arthur N. Economou Co., Inc., which is controlled by respondent Economou (respondents are hereinafter referred to as "respondent"), was registered with the Department of Agriculture as a trader in commodities futures (C.A. App. 12a).[2] As such it was required to maintain the minimum capital balance prescribed by the Secretary of Agriculture. 17 C.F.R. 1.17; see *id.* at 1.10.

In February 1970, following a routine audit of respondent by the Commodity Exchange Authority, petitioner Lyng, Assistant Secretary of Agriculture, issued an administrative complaint pursuant to Section 6(b) of the Commodity Exchange Act, 7 U.S.C. 9, alleging that respondent, while a registered futures commission merchant, willfully failed to maintain that balance (C.A. App. 12a-13a), and directing respondent to show cause why its registration should not be revoked. Following another audit, an amended complaint was issued alleging additional failures to meet the minimum capital requirements (*id.* at 13a). After a hearing, petitioner Bain, the

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[2] "C.A. App." refers to the appendix to the appellees' brief in the court of appeals, a copy of which we are lodging with the Clerk of the Court.

Chief Hearing Examiner of the Department, sustained the complaint in August 1971 (*ibid.*).

On January 15, 1973, petitioner Campbell, the Judicial Officer of the Department, to whom the Secretary has delegated his authority to decide enforcement proceedings under the Commodity Exchange Act (C.A. App. 3a; see 7 U.S.C. 9), affirmed the hearing examiner's decision and suspended respondent's registration for 90 days (see *Economou* v. *Department of Agriculture*, 494 F.2d 519 (C.A. 2)). In March 1974, the court of appeals vacated the order of the Judicial Officer on the ground that "the essential finding of willfulness * * * was made in a proceeding instituted without the customary warning letter," which rendered the finding of willfulness "erroneous on the record taken as a whole, and the sanctions imposed unwarranted." *Ibid.*

2. During the pendency of respondent's administrative appeal to the Judicial Officer from the hearing examiner's decision, respondent filed the present suit seeking $32 million damages. The defendants were the Department of Agriculture and the Commodity Exchange Authority, and the petitioners here, who are the former Secretary of Agriculture, the Assistant Secretary of Agriculture, various officials and auditors of the Authority who were involved in the administrative enforcement action, and the Chief Hearing Officer and Counsel of the Department (C.A. App. 10a-19a). An amended complaint added as a defendant petitioner Campbell, the Department's Judicial Officer.

The amended complaint alleges principally that the defendants conspired to deprive respondent of property without due process of law by wrongfully and maliciously instituting the administrative proceedings against him.[3] The complaint alleges that respondent had not willfully violated the Act, that he had not been given notice and an opportunity to correct the alleged deficiencies prior to the institution of enforcement proceedings, and that the proceedings should not have been instituted since respondent had ceased operating as a futures commission merchant. The complaint also alleges that the defendants knowingly issued false and deceptive press releases in connection with the administrative proceedings. The complaint asserts that the defendants took these actions for the purpose of ruining respondent's business, in retaliation for his outspoken criticism of the regulatory activities of the Authority.

After respondent twice sought unsuccessfully to enjoin the Department's administrative proceeding (C.A. App. 1a-7a, 20a-21a) and following the court of appeals' vacation of the Judicial Officer's order (see *supra*, p. 4), the defendants moved to dismiss the complaint on the grounds that the individual defendants were immune from suit and that the action

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[3] We are lodging a copy of the second amended complaint (see App. A, *infra*, p. 5a) with the Clerk of the Court. It includes a claim for trespass, but the allegations are conclusory (see App. B, *infra*, pp. 23a-24a n. 1), and peripheral to the principal thrust of respondent's case. The trespass claim was not mentioned by the court of appeals in its description of the complaint (see App. A, *infra*, pp. 3a-4a).

against the Department of Agriculture and the Commodity Exchange Authority was barred by sovereign immunity. As a part of the government's opposition to one of the earlier motions for an injunction, a detailed affidavit had been filed describing the actions taken by each individual defendant in the administrative proceedings that formed the basis of the judicial complaint (C.A. App. 10a-19a).[4] On May 22, 1975, the district court dismissed the suit, holding that the individual defendants were absolutely immune and that sovereign immunity barred the suit against the Department of Agriculture and the Commodity Exchange Authority (App. B, *infra*, pp. 23a-28a).

The court of appeals affirmed the dismissal as to the Department and the Authority but reversed as to the individual defendants (petitioners here) and remanded for further proceedings (App. A, *infra*, pp. 1a-22a). The court stated with respect to official immunity (*id.* at 8a) that "[h]ad *Barr* [v. *Matteo*, 360 U.S. 564] represented the last word in this evolving area, we might be inclined, as was the district court, to follow it in this case." But the court of appeals, relying largely upon its reading of *Scheuer* v. *Rhodes*, 416 U.S. 232, and *Wood* v. *Strickland*, 420 U.S. 308, concluded (App. A, *infra*, p. 20a) that "the individual defendants do not require and are not entitled to absolute immunity * * *." Instead, the court held (*ibid.*) that petitioners could "avail

[4] With respect to petitioner Butz, the affidavit states (C.A. App. 14a) that "[h]e has not been directly involved in any of the actions alleged in the complaint herein."

themselves of the defense of qualified 'good faith, reasonable grounds' immunity of the type approved by the Supreme Court in *Scheuer* and *Wood*."

REASONS FOR GRANTING THE WRIT

This case presents important questions concerning the scope of the immunity from suit for damages that federal government officials have for alleged torts committed in the performance of their official duties. In *Barr* v. *Matteo*, 360 U.S. 564, this Court held that those officals have absolute immunity. The question is whether, as the court of appeals ruled, subsequent decisions of this Court holding that state officials sued under the Civil Rights Act have only a qualified immunity have so undermined *Barr* as to require that federal officials also have only that immunity. The case also presents the related question whether government officials engaged in the preparation, trial and adjudication of administrative proceedings have absolute immunity from suit similar to that of judges and prosecutors.

The government submits that, contrary to the view of the court of appeals, *Barr* has not been undermined by the subsequent decisions involving state officials, and that its rationale is no less compelling today than when it was decided. Accordingly, we urge that federal officials should continue to have the absolute immunity recognized in *Barr*. We also contend that the basis of the traditional absolute immunity of judges and prosecutors is no less applicable to officials performing substantially identical

functions in administrative proceedings; they also require absolute immunity in order to insure "the vigorous and fearless performance of * * * [their] duty that is essential to the proper functioning of the * * * [regulatory] system" (*Imbler* v. *Pachtman*, 424 U.S. 409, 427-428).

1. a. In *Barr* v. *Matteo*, *supra*, the plurality opinion held that the acting director of an agency had an absolute immunity from a suit for damages arising out of a defamatory press release that he had issued in his official capacity. The rationale was that it is "important that officials of government should be free to exercise their duties unembarrassed by the fear of damage suits in respect of acts done in the course of those duties—suits which would consume time and energies which would otherwise be devoted to governmental service and the threat of which might appreciably inhibit the fearless, vigorous, and effective administration of policies of government" (360 U.S. at 571).

The doctrine of official immunity recognized in *Barr* rests upon long standing precedent (360 U.S. at 570-574; see *Spalding* v. *Vilas*, 161 U.S. 483; *Gregoire* v. *Biddle*, 177 F.2d 579 (C.A. 2), certiorari denied, 339 U.S. 949). It has been generally followed by the lower courts, which have applied it in a wide variety of contexts. *E.g.*, *Conley* v. *Wilson*, 538 F.2d 323 (C.A. 4), petitions for a writ of certiorari pending, Nos. 76-206 and 76-381; *David* v. *Cohen*, 407 F.2d 1268 (C.A.D.C.); *Mandel* v. *Nouse*, 509 F.2d 1031 (C.A. 6), certiorari denied, 422 U.S.

1008; *Norton* v. *McShane*, 332 F.2d 855 (C.A. 5), certiorari denied, 380 U.S. 981; *Ove Gustavsson Contracting Co.* v. *Floete*, 299 F.2d 655 (C.A. 2), certiorari denied, 374 U.S. 827; *Peterson* v. *Weinberger*, 508 F.2d 45 (C.A. 5), certiorari denied, 423 U.S. 830. There have been a few exceptions. See *Expeditions Unlimited Aquatic Enterprises, Inc.* v. *Smithsonian Institution* (C.A.D.C.), decided June 28, 1976 (No. 74-1899), vacated and petition for rehearing *en banc* granted October 20, 1976; *Apton* v. *Wilson*, 506 F.2d 83 (C.A.D.C.); *Bivens* v. *Six Unknown Named Agents*, 456 F.2d 1339 (C.A. 2); *Mark* v. *Groff*, 521 F.2d 1376 (C.A. 9); *States Marine Lines, Inc.* v. *Shultz*, 498 F.2d 1146 (C.A. 4).

The court of appeals here stated (App A, *infra*, p. 8a) that it "might be inclined, as was the district court, to follow [*Barr*] in this case * * *," "[h]ad *Barr* represented the last word in this evolving area * * *." But the court of appeals concluded that *Barr* had been *sub silentio* overruled or limited to its specific facts by the subsequent decisions in cases such as *Scheuer* v. *Rhodes*, 416 U.S. 232, *Wood* v. *Strickland*, 420 U.S. 308, and *Pierson* v. *Ray*, 386 U.S. 547. Thus, although the court left undisturbed the district court's finding (App. B, *infra*, p. 28a) that the allegedly tortious conduct of petitioners was "both within the scope of their authority and discretionary," it ruled that petitioners had only a qualified immunity of the kind applied in *Scheuer* and *Wood*.

Contrary to the assumption of the court of appeals, the subsequent decisions of this Court have not

overruled or undermined *Barr*. *Scheuer*, *Wood*, and *Pierson* involved suits against state executive officials sued under 42 U.S.C. 1983. In determining the scope of those officials' immunity in that context, the Court had "to take into account * * * the purposes of 42 U.S.C. 1983" (*Scheuer* v. *Rhodes*, *supra*, 416 U.S. at 243), a statute explicitly intended to give a remedy to one who is deprived of a constitutional right by state officials (see *Monroe* v. *Pape*, 365 U.S. 167). Those considerations were not present in *Barr* and are not present in this case.[5]

Recognizing that it did not "write on a clean slate" with respect to 42 U.S.C. 1983, the Court in *Scheuer* v. *Rhodes*, *supra*, 416 U.S. at 243, began its analysis by stating: "It can hardly be argued, at this late date, that under no circumstances can the officers of state government be subject to liability under this statute." See also *Imbler* v. *Pachtman*, *supra*, 424 U.S. at 433-434 (concurring opinion of Mr. Justice White); *Wood* v. *Strickland*, *supra*, 420 U.S. at 315.[6] In contrast, as the Court in *Scheuer*

[5] In cases against state officials the Court has looked initially to state common law in determining their immunity, see *Imbler* v. *Pachtman*, *supra*, 424 U.S. at 418-424; *Pierson* v. *Ray*, *supra*, 386 U.S. at 555, whereas the immunity of federal officials depends upon federal law, see *Barr* v. *Matteo*, *supra*; *Howard* v. *Lyons*, 360 U.S. 593.

[6] In *Imbler* v. *Pachtman*, *supra*, the Court held that a state prosecutor was absolutely immune from a suit under 42 U.S.C. 1983 arising out of the performance of his duty to initiate and pursue a criminal prosecution. However, as Mr. Justice White pointed out in his concurring opinion: "It is manifest * * * that all state officials as a class cannot be immune absolutely from damage suits under 42 U.S.C. § 1983 and that to extend absolute immunity to any group of state officials is to negate *pro tanto* the very remedy which it appears Congress sought to create. * * * Thus, * * * the Court has not extended *absolute* immunity to such officials in the absence of the most convincing showing that the immunity is necessary" (424 U.S. at 433-434, emphasis in original; see *id.* at 436-437). Similarly in *Wood* v. *Strickland*, *supra*, 420 U.S. at 322, the Court stated that the extension of absolute immunity to the state officials in that case would "deny much of the promise of § 1983."

pointed out (416 U.S. at 247), *Barr* v. *Matteo* arose "[i]n a context other than a § 1983 suit." Neither *Barr* nor this case involves a cause of action under a statute, like 42 U.S.C. 1983, that is intended to provide a remedy against individual government officials. Thus, in this case, unlike *Scheuer* and *Wood*, the Court does not have to "take into account" a legislative enactment that is inconsistent with absolute immunity.

The reasoning that underlies *Barr* continues to be valid and supports absolute immunity for petitioners. The actions of petitioners for which damages are sought were all taken within the scope and as part of their duties to enforce the Commodity Exchange Act. Unlike *Barr*, where the question whether the official's act was "within the outer perimeter of [his] line of duty" was considered "a close one" (360 U.S. at 574, 575), the acts complained of here are at the core of petitioners' responsibilities. Enforcement of regulations is an essential function of the executive branch.

Judge Learned Hand explained the problem many years ago in *Gregoire* v. *Biddle, supra,* 177 F.2d at 581 (quoted in *Barr* v. *Matteo, supra,* 360 U.S. at 571), when he stated that "an official, who is in fact guilty of using his powers [maliciously] * * *, should not escape liability for the injuries he may so cause; and, if it were possible in practice to confine such complaints to the guilty, it would be monstrous to deny recovery."[7] But there is no way in which unjust complaints can be avoided. Often "it is impossible to know whether the claim is well founded until the case has been tried * * *" (*ibid.*),[8] and even then an official "may * * * find himself hard put to it to satisfy a jury of his good faith" (*ibid.*). Consequently, even the blameless official who is sued would often be subjected "to the burden of a trial and to the inevitable danger of its outcome" (*ibid.*).

It is easy for persons who believe they have been unfairly treated by government officials to charge that those officials acted "maliciously" in performing their duties. It is the threat of such claims that

[7] Although there must be means to punish and deter misconduct by government officials, "other sanctions than civil tort suits [are] available to deter the executive official who may be prone to exercise his functions in an unworthy and irresponsible manner" (*Barr* v. *Matteo, supra,* 360 U.S. at 576).

[8] As the Court explained in *Imbler* v. *Pachtman, supra,* 424 U.S. at 419, n. 13, absolute immunity "defeats a suit at the outset," whereas "[t]he fate of an official with qualified immunity depends upon the circumstances and motivations of his actions, as established by the evidence at trial."

is likely "appreciably [to] inhibit the fearless, vigorous, and effective administration of policies of government." *Barr* v. *Matteo, supra,* 360 U.S. at 571. For these reasons, "it has been thought * * * better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation" (*Gregoire* v. *Biddle, supra,* 177 F.2d at 581).

This Court has not overruled *Barr;* to the contrary, the Court recently cited it with seeming approval. See *Scheuer* v. *Rhodes, supra; Paul* v. *Davis,* 424 U.S. 693.[9] In the cases involving state officials the Court has stressed that a qualified immunity was necessary to protect the rights granted in 42 U.S.C. 1983 (see p. 10 and n. 6, *supra*). If *Barr* is no longer viable, it is this Court, and not the court of appeals, that should so announce.[10]

b. The allegation in respondent's complaint that petitioners' conduct deprived him of his property without due process of law does not call for a dif-

[9] As Judge Leventhal concluded in his dissenting opinion in *Expeditions Unlimited Aquatic Enterprises, Inc.* v. *Smithsonian Institution, supra,* slip op. 13: "There is too much to be said for the *Barr* choice, there is too much hard work and hard thought when the problem was faced squarely by great judges like John Harlan and Learned Hand, to sweep it aside as the detritus of a doctrine that has been nibbled away *sub silentio.*"

[10] As the Second Circuit has stated on other occasions (*e.g., United States* v. *Karathanos,* 531 F.2d 26, 33 (C.A. 2), certiorari denied, July 6, 1976 (No. 75-1402)): "'[W]e continue to believe that the Supreme Court should retain the exclusive privilege of overruling its own decisions * * *.'"

ferent result.[11] Respondent's complaint here involves basically only a charge of malicious prosecution and libel. The fundamental character of that claim is not altered because respondent has added the allegation that the conduct constituting those torts denied him due process. Such a charge can almost always be made in any tort claims case, and the form in which the pleading is drafted cannot obscure the true nature of the claim.[12]

c. If contrary to our submission, this Court's subsequent decisions have overruled or limited *Barr* v. *Matteo*, then we submit that the qualified immunity that state executive officials have under *Scheuer* v. *Rhodes* provides inadequate protection for federal officials, and that the Court should address the question of the scope and meaning of qualified immunity

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[11] Respondent does not identify the "property" interest which he alleges the petitioners' conduct denied him. He has not been denied any property interest in his license to conduct business as a futures commission merchant, since the court of appeals vacated the administrative order suspending that license. To the extent respondent relies upon injury to his business reputation, that is not a "property" interest protected by the due process clause. See *Paul* v. *Davis*, *supra*.

[12] Respondent's principal claim in his complaint appears to be that the allegedly malicious conduct of government officials damaged his business reputation to his economic detriment. That interest is similar to, and certainly no greater than, that involved in *Barr*, in which the complaint alleged that damage to personal reputation resulted from a defamatory press release. Indeed, part of respondent's claim here rests upon an allegedly defamatory press release and, to that extent, is virtually identical to the claim in *Barr*.

in the federal context. The qualified immunity recognized in *Scheuer*, which requires "the existence of reasonable grounds for the belief formed at the time and in light of all the circumstances, coupled with good-faith belief" (416 U.S. at 247-248), would as a practical matter frequently subject federal officials to a full trial and possible liability whenever their official actions are subsequently held erroneous.

That result would be inconsistent with the underlying reason for immunity in this area—"the necessity of permitting officials to perform their official functions free from the threat of suits for personal liability" (*Scheuer* v. *Rhodes*, *supra*, 416 U.S. at 239). *Scheuer* itself stated (*id.* at 249) that the cases there "present[ed] no occasion for a definitive exploration of the scope of immunity available to state executive officials * * *." *A fortiori*, *Scheuer* did not definitively define the immunity of federal officials. If those officials have only a qualified immunity, they require broader protection than the Court outlined in *Scheuer* for state officials sued under 42 U.S.C. 1983.

2. This case presents the additional important question whether federal government officials have absolute immunity from suits for damages for their actions in prosecuting and adjudicating administrative enforcement proceedings. Judges and prosecutors traditionally have had absolute immunity for acts done in the performance of their judicial and prosecutorial functions. The same policy reasons that underlie that immunity also require absolute immun-

ity for federal officials performing comparable functions in administrative enforcement proceedings.

The absolute immunity of judges and prosecutors is well settled. *Bradley* v. *Fisher*, 13 Wall. 335; *Yaselli* v. *Goff*, 275 U.S. 503, affirming *per curiam* 12 F.2d 396 (C.A. 2); see *Pierson* v. *Ray*, *supra*, and *Imbler* v. *Pachtman*, *supra* (holding that judges and prosecutors have absolute immunity even in suits under 42 U.S.C. 1983). In *Bradley* v. *Fisher*, *supra*, 13 Wall. at 347, the Court explained that "it is a general principle of the highest importance to the proper administration of justice that a judicial officer, in exercising the authority vested in him, shall be free to act upon his own convictions, without apprehension of personal consequences to himself. Liability to answer to every one who might feel himself aggrieved by the action of the judge, would be inconsistent with the possession of this freedom * * *." As this statement indicates, the immunity "is not for the protection or benefit of a malicious or corrupt judge, but for the benefit of the public" (*Scott* v. *Stansfield*, L.R. 3 Ex. 220, 223, quoted in *Pierson* v. *Ray*, *supra*, 386 U.S. at 554), which has a strong interest in the independent and fearless performance of duty by "judicial officer[s]."

The need for absolute, as opposed to qualified, immunity stems in part from the practical consideration that the nature of the adjudicatory function—the resolution of controversies, some of which involve large personal or financial stakes as well as difficult legal and factual questions—makes the adjudicator a

particularly likely and vulnerable target for attack by individuals who consider themselves aggrieved by his judgment. See *Bradley* v. *Fisher*, *supra*, 13 Wall. at 348.

The absolute immunity of prosecutors similarly "is grounded on principles of public policy." *Yaselli* v. *Goff*, *supra*, 12 F.2d at 406. The Court in *Imbler* v. *Pachtman*, *supra*, was concerned that a qualified immunity, although it would permit redress for the genuinely wronged, would expose "even * * * the honest prosecutor" to a "substantial danger of liability" (424 U.S. at 425), with consequences that would "disserve the broader public interest" (*id.* at 427). The likelihood of unfounded litigation and the exposure to liability, the Court feared, "would cause a deflection of the prosecutor's energies from his public duties, and the possibility that he would shade his decisions instead of exercising the independence of judgment required by his public trust" (*id.* at 423).

These considerations are equally applicable to officials performing prosecutorial and judicial functions in administrative enforcement proceedings. They, too, are likely to be deterred from the vigorous and uninhibited initiation, prosecution and decision of enforcement proceedings—which are essential to the effective functioning of federal regulatory programs—by the threat of "harassment by unfounded litigation" if their "case misfires" (*Imbler* v. *Pachtman*, *supra*, 424 U.S. at 423, 421). As in the case of judges and prosecutors, a qualified immunity—under which the official would be "constrained in

making every decision by the consequences in terms of his own potential liability in a suit for damages" (*id.* at 424-425)—would not be adequate to insure "the vigorous and fearless performance" of duty (*id.* at 427).

The present case compellingly illustrates the need for absolute immunity. Two of the petitioners, Judicial Officer Campbell and Hearing Examiner Bain, have been sued for their action in presiding over and deciding the administrative action against respondent.[13] The decision of the court of appeals, which exposes these officials to the threat of multi-million dollar personal liability, inevitably is likely to affect adversely the actions of all government officials whose function is to decide administrative cases.[14]

[13] As in *Pierson* v. *Ray*, *supra*, 386 U.S. 553, there is no indication that the petitioners played any role other than to decide the case before them. To the extent that their decision was erroneous, the error was subject to correction by the court of appeals—as happened in this case (see p. 4, *supra*).

[14] The court of appeals suggested (App. A, *infra*, pp. 18a-19a) that administrative law judges generally exercise less discretion than their counterparts in the judicial context, and that the outcome of administrative proceedings has less of an impact upon defendants. Administrative enforcement proceedings, however, frequently involve complex issues and require the exercise of considerable discretion by the administrative law judge. Moreover, such proceedings often involve important and hotly contested issues. Administrative proceedings authorized by the Securities and Exchange Commission against publicly-held companies, broker-dealers and accountants for violations of the securities laws, proceedings by the Food and Drug Administration against doctors and drug companies for selling unsafe or ineffective products, and actions by the Federal Trade Commission to remedy anti-

A similar analysis is applicable to those petitioners who were involved in initiating and prosecuting the enforcement proceeding.[15] They performed, in the administrative proceeding, the same functions a prosecutor performs in a judicial proceeding. These

trust violations or false advertising, are only a few examples of administrative proceedings which are closely analogous, both in their intensely adversarial context and in the effect of the sanctions imposed, to criminal trials. These proceedings often result in far-reaching and precedent-setting decisions in such fields as antitrust, securities regulation, consumer protection and public health, which are of major importance to the regulation of the industries involved.

The court of appeals also seemed to suggest (*id.* at 19a-20a) that the separation of powers principle is an additional ground for the absolute immunity of judges which does not apply to administrative law judges. But prosecutors, who are members of the executive branch, have essentially the same immunity as judges. The question of immunity is not to be determined by "judicial fiat that officials in different branches of government are differently amenable to suit" (*Imbler* v. *Pachtman*, *supra*, 424 U.S. at 421) or by reference to the title of an individual's office; it is "the duties with which the particular officer * * * is entrusted * * * which must provide the guide in delineating the scope of the * * * executive officer['s] * * * immunity from * * * suit[ ]" (*Barr* v. *Matteo*, *supra*, 360 U.S. at 573-574).

[15] This includes petitioner Lyng, Assistant Secretary of Agriculture for Marketing and Consumer Services, who issued the complaint; petitioner Caldwell, who participated in the initiation of prosecution; petitioner Davis, the administrative prosecutor; and, to the extent they participated in the prosecution, petitioners Wolkis, Robinson, Kirchhoff, and McMinn (C.A. App. 10a-19a). In addition, petitioners Caldwell, Robinson, Kirchhoff, and McMinn, who participated in the decision to initiate the investigation, also may be entitled to this immunity, since the decision to make an investigation is a preliminary step looking to the administrative enforcement proceedings.

officials also must be free to make decisions—both in initiating and in conducting an enforcement action—based upon an independent exercise of judgment, without always having to consider the possibility of substantial personal liability if their decisions should ultimately prove to have been unwise or erroneous.[16]

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[16] The court of appeals suggested (App. A, *infra*, p. 20 n. 8) that absolute immunity for those performing prosecutorial functions in the administrative context is unnecessary since administrative proceedings "of the type involved in the present case * * * usually turn more on documentary proof than the veracity of witnesses," and involve fewer "constraints of time and * * * information" than a criminal prosecution. The need for absolute immunity to allow administrative prosecutors to act vigorously exists regardless of the type of evidence used or the time constraints involved. In any event, the court's suggestion rests on dubious factual assumptions. While the issue in this particular administrative proceeding —whether the respondent maintained the minimum capital balance prescribed by regulation—may have involved largely documentary proof, many, if not most, administrative enforcement proceedings involve extensive oral testimony. See, *e.g.*, *Air East, Inc.* v. *National Transportation Safety Board*, 512 F.2d 1227 (C.A. 3), certiorari denied, 423 U.S. 863; *George Steinberg & Son, Inc.* v. *Butz*, 491 F.2d 988 (C.A. 2); *Nadiak* v. *Civil Aeronautics Board*, 305 F.2d 588 (C.A. 5), certiorari denied, 372 U.S. 913. Often they involve constraints of time comparable to those in criminal trials. See, *e.g.*, suspension proceedings under the Federal Insecticide, Fungicide and Rodenticide Act, 86 Stat. 985, 7 U.S.C. (Supp. V) 136d(c)(2), revocation of certification proceedings under the Federal Aviation Act, 72 Stat. 779, as amended, 49 U.S.C. (Supp. V) 1429(a), and proceedings for the issuance of emergency temporary standards under the Occupational Safety and Health Act, 84 Stat. 1596, 29 U.S.C. 655(c). On the other hand, many criminal proceedings involve primarily documentary evidence.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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NOVEMBER 1976.

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 749—September Term, 1975

(Argued February 26, 1976 Decided April 23, 1976)

Docket No. 75-6050

ARTHUR N. ECONOMOU, PLAINTIFF-APPELLANT

—against—

UNITED STATES DEPARTMENT OF AGRICULTURE; EARL L. BUTZ, Secretary of Agriculture; RICHARD T. LYNG, Assistant Secretary of Agriculture; COMMODITY EXCHANGE AUTHORITY; ALEX C. CALDWELL, Act Administrator, Commodity Exchange Authority; CHARLES E. ROBINSON, Director, Compliance Division, Commodity Exchange Authority; RICHARD E. KIRCHOFF, Deputy Director, Registration and Audit Division, Commodity Exchange Authority; JACK W. BAIN, Chief Hearing Examiner, United States Department of Agriculture; RICHARD W. DAVIS, JR., Counsel, United States Department of Agriculture; REED MCMINN, Regional Administrator, New York Regional Office, Commodity Exchange Authority; CLEMENT GROSS, Auditor, Commodity Exchange Authority; MURRAY A. WOLKIS, Auditor, Commodity Exchange Authority; EDWARD FITZPATRICK, Auditor, Commodity Exchange Authority,

DEFENDANTS-APPELLEES

Before: MANSFIELD, TIMBERS and MESKILL, *Circuit Judges.*

MANSFIELD, *Circuit Judge*:

Having long recognized the privilege of judges and legislators as a complete defense to civil damage actions based on their official conduct, see *Bradley* v. *Fisher*, 80 U.S. (13 Wall.) 335 (1872) (judges); *Tenney* v. *Brandhove*, 341 U.S. 367 (1951) (legislators),[1] the Supreme Court in recent years has focused more sharply upon the scope of the immunity to be extended to those employed by the executive branch of a government, including state prosecutors, *Imbler* v. *Pachtman*, —— U.S. ——, 44 U.S.L.W. 4250 (Mar. 2, 1976); school board members, *Wood* v. *Strickland*, 420 U.S. 308 (1975); top state officers, *Scheuer* v. *Rhodes*, 416 U.S. 232 (1974), and policemen, *Pierson* v. *Ray*, 386 U.S. 547 (1967). This appeal raises the issue with respect to the United States Department of Agriculture, the Commodity Exchange Authority ("CEA" herein), and various officials of these agencies who were sued for damages based on their alleged wrongful and malicious enforcement of the Commodity Exchange Act, 7 U.S.C. §§ 1, *et seq.*, against the plaintiffs. Judge Lloyd F. MacMahon of the Southern District of New York dismissed the damage suit on the ground that the defendants are

[1] Members of Congress are expressly protected by Art. 1, § 6 of the Constitution, which provides that, "for any speech or debate in either House, they shall not be questioned in any other place."

entitled to absolute immunity from such liability. We affirm the dismissal as to the administrative agencies on the ground that federal jurisdiction over the claims against them is lacking. In all other respects the district court's order is reversed and the case remanded for further proceedings consistent with this opinion.

On February 19, 1970, the Secretary of Agriculture, as a result of a CEA audit of Arthur N. Economou and his trading company, Arthur N. Economou Co., Inc. (collectively referred to as "appellant" herein), issued an administrative complaint pursuant to the Commodity Exchange Act, 7 U.S.C. § 9 ("the Act" herein), alleging that appellant, while a registered futures commission merchant, had failed to maintain the minimum prescribed capital balance for such activity as required by rules promulgated under the Act, see 17 C.F.R. § 1.17, and directing appellant to show cause why his registration should not be revoked. Following another such audit, an amended complaint was issued against appellant on June 22, 1970. After a hearing before a Department of Agriculture hearing examiner, at which appellant appeared *pro se*, a report adverse to appellant was issued by the examiner on August 17, 1971.

In the meantime, while the examiner's report, to which appellant excepted, was under review by the Judicial Officer of the Department of Agriculture, appellant commenced the present action for $32,000,000 damages in the district court against some 13 defendants, including the Department of Agricul-

ture, Commodity Exchange Authority, the Secretary and Assistant Secretary of Agriculture, various administrators, and officials and auditors of the CEA, and the Chief Hearing Officer and Counsel of the Department of Agriculture. The complaint alleged in substance that defendants, acting outside their discretionary duties and functions, had wrongfully and maliciously instituted the proceedings against him for the purpose of ruining his business reputation, retaliating against him for his previous outspoken criticism of the defendants' activities, and causing harm to his business. Appellant alleged that he had not wilfully violated the Act, that he had not been given notice and an opportunity to correct the alleged violations of CEA rules before the institution of the administrative proceedings against him, that the proceeding should have been terminated since he was no longer engaged in the regulated activity, and that in connection with their prosecution of that proceeding the defendants had knowingly caused deceptive press releases to be issued, which falsely indicated to the public that appellant's financial resources had deteriorated. As a result, the complaint further alleged, some of appellant's customers were no longer willing to do business with him, his credit standing was damaged, and appellant was forced to expend large sums of money to defend himself against the false charges.

The district court twice denied appellant's application for preliminary injunctive relief restraining the CEA enforcement proceeding against him. There-

after appellant chose to pursue his lawsuit in a desultory fashion, taking little or no action for long periods. While his damage action thus remained dormant, the Agriculture Department's Judicial Officer affirmed the hearing examiner's findings, whereupon appellant petitioned us for review. On March 28, 1974, we granted appellant's petition and set aside the Department's enforcement order on the ground that "the essential finding of wilfulness . . . was made in a proceeding instituted without the customary warning letter," rendering it "erroneous on the record taken as a whole, and the sanctions imposed unwarranted," 494 F.2d 519 (2d Cir. 1974).

After another long period of inaction, broken only by the district court's indication that the case might be dismissed for non-prosecution, the defendants' motion to dismiss appellant's second amended complaint was granted by Judge MacMahon on May 22, 1975, on the ground that the defendants were entitled to absolute immunity. From this decision plaintiffs appeal.

Discussion

We need not tarry over the district court's dismissal of appellant's claims against the Department of Agriculture, and the Commodity Exchange Authority, which was clearly correct. Congress has not authorized either entity to be sued in its own name, and thus we lack jurisdiction over them. See *Blackmar* v. *Guerre*, 342 U.S. 512 (1952). Nor is there any reason to accept appellant's suggestion that the complaint now be amended to name the United States

of America as a defendant, since the "intentional tort" exclusion of the Federal Tort Claims Act, 28 U.S.C. § 2680(h), would deny us jurisdiction over such claims against the United States, even though appellant's claims of malicious prosecution, abuse of process, and libel be cast in constitutional terms.[2] See *Peterson* v. *Weinberger*, 508 F.2d 45, 50 (5th Cir. 1975), *cert. denied*, 44 U.S.L.W. 3201 (Oct. 6, 1975).

Turning to the claims against the individual defendants, the district court based its dismissal mainly upon principles expressed in the plurality opinion of Justice Harlan in *Barr* v. *Matteo*, 360 U.S. 564 (1959), which we followed in *Ove Gustavsson Contracting Co.* v. *Floete*, 299 F.2d 655 (2d Cir. 1962). In *Barr* v. *Matteo*, the Supreme Court, by a 5 to 4 vote, held that the Acting Director of the Office of Rent Stabilization, a federal agency, was entitled to an absolute privilege against liability in damages for a defamatory press release issued by him, once it had been established that the action taken "was within the outer perimeter of [his] line of duty," even though his action was not a duty imposed on him but rather an exercise of discretion and was allegedly prompted by malice toward the plaintiff. In an opinion shared by three other justices (Frankfurter, Clark and Whittaker), Justice Harlan reasoned that an absolute privilege was required for the reason

> "that officials of government should be free to exercise their duties unembarrassed by the fear of damage suits in respect of acts done in the course of those duties—suits which would consume time and energies which would otherwise be devoted to governmental service and the threat of which might appreciably inhibit the fearless, vigorous, and effective administration of policies of government." 360 U.S. at 571.

Recognizing that "there may be occasional instances of actual injustices which will go unredressed," he concluded that such a price is "a necessary one to pay for the greater good, especially since "other sanctions than civil tort suits [are] available to deter the executive official who may be prone to exercise his functions in an unworthy and irresponsible manner," 360 U.S. at 576. Separate dissenting opinions were filed by Chief Justice Warren (in which Justice Douglas concurred) and Justices Brennan and Stewart. Accepting the view that an absolute privilege might attach to intra-agency reports or statements of Cabinet members, Justice Warren concluded that in the case of lesser officials a qualified privilege would suffice to enable them to perform their duties without undue harassment and at the same time protect a victim of their maliciously wrongful conduct.

Concluding that the alleged conduct of the defendants in the present case was "within the outer perimeter of their authority" and involved the exer-

[2] The acts of which appellant complains all occurred before March 16, 1974 when § 2680(h) was amended by Pub. L. 93-253, 88 Stat. 50, to allow suits against the United States on the basis of certain intentional torts if committed by federal "investigative or law enforcement officers." In any event, the defendants in this case do not appear to be such officers.

cise of discretion, Judge MacMahon dismissed the complaint on the ground that the defendants were entitled to immunity. Had *Barr* represented the last word in this evolving area, we might be inclined, as was the district court, to follow it in this case, despite the melange of differing views expressed by various members of the Court on the subject in that case, no one of which commanded a majority. However, the Court has since elucidated its views in a series of decisions which were neither cited by the government to the district court nor discussed by Judge MacMahon. The principles developed in these later cases lead us to the conclusion that the district court's summary dismissal cannot stand.

We start with *Pierson* v. *Ray*, 386 U.S. 547 (1967), which posed the question of whether petitioners there, black clergymen who were arrested by police for attempting to use a segregated bus terminal waiting room and tried before a municipal police justice, could recover damages in a civil action instituted by them against the judge and the police under 42 U.S.C. § 1983 after the conviction of one had been set aside and the charges against the others dropped. The Supreme Court held that the traditional absolute immunity of judges survived Congress' enactment of § 1983, and that policemen, who had never enjoyed an absolute and unqualified immunity at common law, were limited to the qualified common law immunity which had been extended to them prior to § 1983, i.e., the defense that they acted in good faith and with probable cause to believe the persons arrested had violated the law. Accordingly, the dismissal of the claims against the judge was upheld and the claims against the policemen were remanded for further proceedings.

In *Scheuer* v. *Rhodes*, 416 U.S. 232 (1974), the governor of Ohio and other high state officials, who had been sued for damages for their alleged connection with the killing of several Kent State University students by the Ohio National Guard, contended that they were entitled to absolute immunity from civil damage liability. The Supreme Court rejected this contention, unanimously holding that they were at most entitled to a qualified "good-faith, reasonable grounds" immunity, the scope of which would depend upon "the functions and responsibilities of these particular defendants in their capacities as officers of the state government, as well as the purposes of 42 U.S.C. § 1983," 416 U.S. at 243. Speaking for a unanimous court (except for Justice Douglas who took no part in the decision), Chief Justice Burger traced the history of the development of the law of immunity of government officials from personal liability for their official acts, stating:

> "This official immunity apparently rested, in its genesis, on two mutually dependent rationales: (1) the injustice, particularly in the absence of bad faith, of subjecting to liability an officer who is required, by the legal obligation of his position, to exercise discretion; (2) the danger that the threat of such liability would deter his willingness to execute his office with the decisive-

ness and the judgment required by the public good.

* * * *

"Public officials, whether governors, mayors or police, legislators or judges, who fail to make decisions when they are needed or who do not act to implement decisions when they are made do not fully and faithfully perform the duties of their offices. Implicit in the idea that officials have some immunity—absolute or qualified—for their acts, is a recognition that they may err. The concept of immunity assumes this and goes on to assume that it is better to risk some error and possible injury from such error than not to decide or act at all." [Footnotes omitted] 416 U.S. at 239-42.

Of counterbalancing importance, the Court went on to note, is the interest of the wronged individual in being compensated for harm caused him by the public official's abuse of power and invasion of his rights, for which § 1983 was enacted to provide a remedy. Noting that "It can hardly be argued, at this late date, that under no circumstances can the officers of state government be subject to liability under this statute [42 U.S.C. § 1983]" the Court, although quoting a portion of Justice Harlan's *Barr* opinion with approval, nevertheless concluded as follows on the basis of its evaluation of the counterbalancing policy considerations:

"These considerations suggest that, in varying scope, a qualified immunity is available to officers of the executive branch of government, the variation being dependent upon the scope of

discretion and responsibilities of the office and all the circumstances as they reasonably appeared at the time of the action on which liability is sought to be based. It is the existence of reasonable grounds for the belief formed at the time and in light of all the circumstances, coupled with good-faith belief, that affords a basis for qualified immunity of executive officers for acts performed in the course of official conduct."

Since the Court could not dispose of the case without a factual record based on evidence of each defendant's good faith and of the scope of his authority, it reversed the dismissal of the complaints and remanded the case for "[F]urther proceedings, either by way of summary judgment or by trial on the merits," 416 U.S. 250.[3]

The qualified "good-faith, reasonable grounds" standard was more recently reaffirmed by the Su-

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[3] Since *Scheuer*, several circuits have followed the "good faith-reasonable grounds" standard as governing the scope of immunity available to executive government officials. See *Jones* v. *Diamond*, 519 F.2d 1090, 1100-01 (5th Cir. 1975) (local elected officials); *Apton* v. *Wilson*, 506 F.2d 83 (D.C. Cir. 1974) (Justice Department officials); *Rowley* v. *McMillan*, 502 F.2d 1326, 1335 (4th Cir. 1974) (Secret Service director); *States Marine Lines* v. *Shultz*, 498 F.2d 1146 (4th Cir. 1974) (Treasury Secretary); *Burkhart* v. *Saxbe*, 397 F. Supp. 499 (E.D. Pa. 1975) (Attorney General). The defendants' reliance on our decision in *Gallela* v. *Onassis*, 487 F.2d 986, 993-94 (2d Cir. 1973), which predates *Scheuer*, is misplaced, since in *Gallela* the Secret Service defendants proved they had reasonable grounds for their action. See *id.* at 993.

preme Court in *Wood* v. *Strickland*, 420 U.S. 308 (1975), as the standard for defining the scope of immunity available to officials of the executive branch —in that case state school administrators and school board members—from civil damage liability. The issue arose when students expelled from school, claiming that the expulsion had violated their constitutional rights, sued the administrators and board members for damages. Rejecting the school officials' contention that they were entitled to absolute immunity, the majority of the Court, in an opinion by Justice White, pointed out that while legislators and judges had traditionally enjoyed such immunity at common law, the common law immunity of public school officials had been limited to "good-faith, non-malicious action taken to fulfill their official duties," even though such board members "function at different times in the nature of legislators and adjudicators in the school disciplinary process and, like the state executive officers in *Scheuer* v. *Rhodes*, *supra*, must often act promptly on the basis of information supplied by others." 420 U.S. at 318-19. The Court concluded that while some immunity was essential to prevent the conscientious school decision-maker from being deterred in exercising his judgment independently, forcefully and in the school's interest and to avoid discouraging the most capable candidates for school board position from serving because of the risk of heavy damages which they could not afford to pay, a qualified immunity would suffice. Absolute immunity, on the other hand, "would not sufficiently

increase the ability of school officials to exercise their discretion in a forthright manner to warrant the absence of a remedy for students subjected to intentional or otherwise inexcusable deprivations," 420 U.S. at 320. The immunity, said Justice White, "must be such that public school officials understand that action taken in the good-faith fulfillment of their responsibilities and within the bounds of reason under all the circumstances will not be punished and that they need not exercise their discretion with undue timidity," 420 U.S. at 321.[4]

The latest chapter in the development of principles governing the immunity of governmental officials of the executive branch is to be found in the Supreme

[4] The Supreme Court's rejection of absolute immunity for school board officials in *Wood* was unanimous. However, the Court split on the subject of what standard would govern in defining good faith. The majority concluded that in determining whether a school board member acted in good faith he would be charged with knowledge of a student's clearly established constitutional rights. Four members of the Court dissented from this aspect of the qualified immunity standard on the ground that it imposed an excessive burden on the official. Instead, the minority would have held an official immune if "in the light of the discretion and responsibilities of his office, and under all the circumstances as they appeared at the time, the officer acted reasonably and in good faith," 420 U.S. 308, even though he may have been unaware of the legal principles which governed the rights of the disciplined student.

For purposes of the present appeal, this difference is immaterial. Application to this case of the qualified immunity standard of either the majority or of the minority in *Wood* v. *Strickland* would call for reversal in the present posture of the case.

Court's very recent decision in *Imbler* v. *Pachtman*, —— U.S. ——, 44 U.S.L.W. 4250 (Mar. 2, 1976). There the Court upheld the traditional absolute immunity of a state prosecuting attorney acting within the scope of his duties from civil damage liability under § 1983 based on the allegation that he had knowingly used false testimony in the criminal prosecution of Imbler, who later brought the civil damage suit against him. The Court, noting that various courts of appeal had been "virtually unanimous that a prosecutor enjoys absolute immunity from § 1983 suits for damages when he acts within the scope of his official duties,"[5] indicated that a decision regarding the immunity of an executive official must be "predicated upon a considered inquiry into the immunity historically granted the relevant official at common law and the interests behind it," 42 U.S.L.W. at 4254. In the case of the public prosecutor, his common law absolute immunity, grounded on the same principles underlying the immunity of judges and grand jurors, had been firmly established.

Speaking for 5 out of 8 members of the Court in *Imbler*,[6] Justice Powell reasoned that a qualified immunity would not give sufficient protection to the

[5] The Supreme Court cited *Fanale* v. *Sheehy*, 385 F.2d 866, 868 (2d Cir. 1967), and *Yaselli* v. *Goff*, 12 F.2d 396 (2d Cir. 1926). It also quoted with approval statements by Judge Learned Hand from his oft-cited decision in *Gregoire* v. *Biddle*, 177 F.2d 579 (2d Cir. 1949), *cert. denied*, 339 U.S. 949 (1950).

[6] Justice Stevens took no part in the consideration or decision of the case.

prosecutor to enable him to engage in the independent and fearless performance of his duties which are essential to the functioning of the criminal justice system, since the prosecutor would face great difficulty in meeting a qualified immunity standard because he frequently must act under constraints of time and information, he of necessity deals with witnesses of doubtful veracity, and he must be given wide latitude in the trial of a criminal case. To expose him to the possibility of years later being required to justify his conduct or face liability in damages would unduly inhibit his performance of his duties and disserve the public. Balancing the interests at stake, the Court reasoned that the public interest in deterring misconduct would adequately be protected through criminal and professional disciplinary sanctions and that Congress did not intend in enacting § 1983 to repeal "absolute immunities so firmly rooted in the common law and supported by strong policy reason."

In a concurring opinion Justice White reasoned that, while certain absolute immunities had survived Congress' enactment of § 1983, others, which related principally to officers and employees in the executive branch, had not continued for the reason that they were not considered essential to enable the officer to perform his duties effectively. He agreed that, while absolute immunity for prosecutors is necessary to protect the judicial process and to avoid discouraging the prosecutor from performing his important duty of initiating and conducting criminal

prosecutions, it should not extend to damage suits based on his withholding or suppression of evidence, since this should not adversely affect his incentive to prosecute and would therefore not injure the judicial process.

From this recent development of the law of government officials' immunity certain conclusions may be drawn. Damage suits against government officials for abuse of governmental power frequently serve the public interest by deterring official misconduct and assuring the individual's freedom to exercise his constitutional rights, including his right to criticize his government. On the other hand, such suits may also have the purpose or effect of harassing conscientious public officers, undermining or inhibiting fearless executive performance, and deterring competent persons from accepting or continuing to hold public service positions. Since the effect of a grant of immunity is to "negate *pro tanto* the very remedy which Congress sought to create [by enactment of 42 U.S.C. § 1983] . . . the Court has not extended *absolute* immunity to such officials in the absence of a showing that the immunity is necessary," *Imbler* v. *Pachtman*, —— U.S. ——, 44 U.S.L.W. at 4258 (concurring opinion of Justice White, citing *Wood* v. *Strickland*, *supra*; *Scheuer* v. *Rhodes*, *supra*; and *Pierson* v. *Ray*, *supra*) "notwithstanding the fact that, at least with respect to high executive officers, absolute immunity from suit for damages would have applied at com-

mon law. *Spaulding* v. *Vilas*, 161 U.S. 483; *Alzua* v. *Johnson*, 231 U.S. 106," *id.*, 44 U.S.L.W. at 4258.[7]

While officials engaged in initiating and hearing administrative proceedings such as those in the present case did enjoy a considerable measure of immunity at common law, its scope was not as settled or as clear as that enjoyed by judges, legislators and prosecutors. Although federal courts leaned toward affording such officials an absolute immunity, see *Spaulding* v. *Vilas*, *supra*; *Gregoire* v. *Biddle*, 177 F.2d 579 (2d Cir. 1949), *cert. denied*, 339 U.S. 949 (1950), state courts persistently indicated, at least in dicta, that even formal action taken by an administrative tribunal could give rise to tort liability

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[7] The defendants' attempted distinction of *Scheuer* and similar cases on the ground that 42 U.S.C. § 1983, under which they were brought, is by its own terms a "substantial disavowal of a state official's right to claim immunity" must be rejected. This court has already recognized that it would be "incongruous and confusing, to say the least" to develop different standards of immunity for state officials sued under § 1983 and federal officers sued on similar grounds under causes of action founded directly on the Constitution. *Bivens* v. *Six Unknown Named Agents of the Federal Bureau of Narcotics*, 456 F.2d 1339, 1346-47 (2d Cir. 1972). Other circuits have also concluded that the Supreme Court's development of official immunity doctrine in § 1983 suits against state officials applies with equal force to federal officers sued on a cause of action derived directly from the Constitution, since both types of suits serve the same function of protecting citizens against violations of their constitutional rights by government officials. See *Apton* v. *Wilson*, *supra*, 506 F.2d at 92-93; *States Marine Lines Inc.* v. *Shultz*, *supra*, 498 F.2d at 1159; *Bethea* v. *Reid*, 445 F.2d 1163, 1166 (3d Cir. 1971), *cert. denied*, 404 U.S. 1061 (1972).

for the officials involved if the act had been undertaken with malice. See, e.g., *Paoli* v. *Mason*, 325 Ill. App. 197, 59 N.E.2d 499 (1945); *State ex rel. Robertson* v. *Farmers' State Bank*, 162 Tenn. 499, 39 S.W.2d 281 (1931); Jennings, *Tort Liability of Administrative Officers*, 21 Minn. L. Rev. 263, 276-80 (1937). But see *Sweeney* v. *Young*, 82 N.H. 159, 131 Atl. 155 (1925). In some instances, administrative officials were even held liable for good faith mistakes in judgment, on the paradoxical theory that their mistake in judgment amounted to action wholly outside their jurisdiction. See, e.g., *Miller* v. *Horton*, 152 Mass. 540, 26 N.E. 100 (1891), where Justice Holmes held that a board of officials' authority to destroy diseased horses did not render them immune from damages for their destruction of a healthy horse.

The contrast between the absolute immunity clearly available at common law to judges, prosecutors, and legislators, and the somewhat confused state of the common law in regard to administrative officials reflects distinctions in the character of their respective functions. The traditional common law absolute immunity of those directly connected with the judicial and legislative processes from civil damage liability has been upheld because the possible beneficial effects of civil damage suits in deterring official misconduct on the part of such officials and in insuring free exercise of constitutional rights would be heavily outweighed by the erosion of these vital processes that such suits would engender. Because

they are frequently called upon to exercise wide discretionary powers which can have serious personal impact upon individuals and thus create an incentive to sue, judges and prosecutors would be particularly vulnerable to damage suits for malicious prosecution. Judges further would face serious personal problems in the defense of such suits. The judge would be forced either personally to bear the expense of his own defense or be put in the uncomfortable position of being defended by some other branch of the government, which might appear before him frequently as an adversary. Similarly the legislator exercises the widest of discretionary powers, the performance of which was thought important enough by the Founding Fathers to warrant a constitutional grant of immunity. To force a judge, prosecutor or legislator to assume the burden of establishing a "good faith, reasonable grounds" defense would impose an excessive burden on the functioning of the judicial and legislative process.

When it comes to suits against officials of the executive branch of a government, however, there does not appear to be any such obvious need for absolute immunity, as distinguished from a qualified immunity, to insure performance of their essential government functions. For the most part the discretionary powers of officials in the executive branch are more circumscribed than are those of legislators, prosecutors or grand jurors. Unlike the judge, the official or employee of a department of the executive branch of a state or federal government, upon being

sued for damages, would not face a conflict of interest if the state or federal government followed its usual practice of agreeing to provide him with representation by counsel drawn from the executive branch. For these reasons the trend, as reflected in *Scheuer* v. *Rhodes*, *supra*, and *Wood* v. *Strickland*, *supra*, has been toward the view that a qualified rather than absolute immunity is sufficient to insure the functioning of the executive branch and at the same time to protect the public against abuse of official power.

Applying these principles here, we are satisfied that the individual defendants do not require and are not entitled to absolute immunity in order to enable them to perform their duties. We believe that they and the performance of their executive duties are adequately protected by permitting them to avail themselves of the defense of qualified "good faith, reasonable grounds" immunity of the type approved by the Supreme Court in *Scheuer* and *Wood*.[8] If, in-

[8] While some of the Agriculture Department officials may be analogized to criminal prosecutors, in that they initiated the proceedings against appellant, and presented evidence therein, the reasons why the Supreme Court felt the public prosecutor "would face greater difficulty in meeting the standards of qualified immunity than other executive or administrative officials" do not seem applicable to them. In administrative proceedings of the type involved in the present case the issues (e.g., whether the respondent maintained the minimum capital balance prescribed by regulation) usually turn more on documentary proof than the veracity of witnesses, and generally do not involve the "serious constraints of time and even information" sometimes present in criminal cases. The administrative proceedings against appellant, for instance, centered on an analysis of his financial records.

deed, the plaintiff has evidence to the effect that the proceedings against him were instituted and prosecuted maliciously and without reasonable grounds, or that the defendants knowingly caused the defamatory press releases to be issued regarding him or his company, the policy against abuse of official power requires that he be given an opportunity to prove his claim.[9] If, on the other hand, the plaintiff's claims are baseless, as defendants maintain, our holding does not necessarily require them to face an expensive, protracted or wasteful trial. Should the defendants by affidavit set forth undisputed facts demonstrating the reasonableness of their action, buttressed by affidavits of their good faith, and the plaintiff then fail to respond under oath with "specific facts showing that there is a genuine issue for trial" regarding the defendants' good faith or the existence of reasonable grounds for their action, summary judgment dismissing the complaint might be appropriate.[10] Rule 56(e), F.R.Civ.P. See *Donnelly* v. *Guion*, 467 F.2d 290, 293-94 (2d Cir. 1972), where we stated:

[9] Of course mere proof that the Department of Agriculture failed to issue a customary warning letter, which was the basis of our refusal to enforce the order, see 494 F.2d 519 (2d Cir. 1974), would not suffice to show bad faith or lack of reasonable grounds.

[10] Nor would summary judgment be precluded by our recent decisions in *Heyman* v. *Commerce & Industry Insurance Co.*, 524 F.2d 1317 (2d Cir. 1975), and *Judge* v. *City of Buffalo*, 524 F.2d 1321 (2d Cir. 1975), where genuine issues as to material facts precluded a grant of summary judgment.

> "A party opposing a motion for summary judgment simply cannot make a secret of his evidence until the trial, for in doing so he risks the possibility that there will be no trial. A summary judgment motion is intended to 'smoke out' the facts so that the judge can decide if anything remains to be tried. *See* Applegate v. Top Associates, Inc., 425 F.2d 92 (2d Cir. 1970); Dressler v. MV Sandpiper, 331 F.2d 130 (2d Cir. 1964); Radio City Music Hall Corp., supra; 6 Moore, Federal Practice ¶ 56.11 [3] at 2171-75." [Footnote omitted]

We mention this remedy not to indicate any views on the merits of such a motion, which would turn on the record before the district court, but to respond to the contention that an absolute privilege is essential to save the defendants from an excessive burden.[11]

The order is affirmed as to the claims against the Department of Agriculture and Commodity Exchange Authority. In all other respects the order is reversed and the case remanded for further proceedings consistent with this opinion.

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[11] See James, *Tort Liability of Governmental Units and Their Officers*, 22 U. Chi. L. Rev. 610, 647 (1955) (criticizing view that "the mere inquiry into malice would have worse consequences than the possibility of actual malice.")

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[Filed, The District Court, May 22, 1953]

72 Civ. 478

ARTHUR N. ECONOMOU ET AL., PLAINTIFFS

—against—

UNITED STATES DEPARTMENT OF AGRICULTURE ET AL., DEFENDANTS

MEMORANDUM

MacMAHON, District Judge.

Defendants move, pursuant to Rule 12(b), Fed. R.Civ.P., to dismiss the second amended complaint on the ground that it is barred as to the governmental agencies by the doctrine of sovereign immunity and as to the individual governmental employees by the doctrine of official immunity.

At first blush, plaintffs' lengthy second amended complaint appears to allege ten "causes of action." Upon close examination of the second amended complaint, however, we conclude that it only makes three claims that defendants deprived plaintiffs Arthur N. Economou (ANE) and Arthur N. Economou & Co., Inc. (ANE, Inc.)[1] of their constitutional rights:

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[1] In the second amended complaint, American Board of Trade, Inc. (AMT, Inc.) appears as a plaintiff. The only

(1) defendants' decision to initiate disciplinary proceedings against plaintiffs under § 9 of the Commodity Exchange Act (Act) without first issuing a warning letter; (2) defendants' decision to continue disciplinary proceedings against plaintiffs even though they were no longer in business as futures commission merchants under the Act; and (3) defendants' issuance of inaccurate press releases concerning plaintiffs.

The defendants, the United States Department of Agriculture and the Commodity Exchange Authority, as agencies of the United States, can invoke the doctrine of sovereign immunity as a bar to suit unless congress has authorized them to be used [*sic*] in their own name.[2] Since it is undisputed that congress has not authorized either agency to be sued, we dismiss the complaint as to them.

The individual defendants, all officials of the United States Department of Agriculture or the Commodity Exchange Authority, contend that they are protected from suit by the doctrine of official immunity. In

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reference to this plaintiff is in paragraphs 25 and 26 of the second amended complaint, wherein it is alleged that defendants' acts vis-a-vis plaintiffs ANE and ANE, Inc. caused AMT, Inc. emotional burdens and resulted in trespass on its land. Those vague and conclusory allegations completely fail to establish a causal link between defendants' acts and the alleged harm to AMT, Inc. We, therefore, grant defendants' Rule 12(b) motion as to AMT, Inc. and reference to "plaintiffs" in the text will mean ANE and ANE, Inc. only.

[2] *Blackmar* v. *Guerre*, 342 U.S. 512 (1952).

order to establish this defense, defendants must show that their alleged unconstitutional acts were within the outer perimeter of their authority and discretionary.[3]

Defendants can establish that their acts were within the outer perimeter of their authority if they can show that the acts had more or less connection with the general matters committed by law to their control or supervision.[4]

The initiation and maintenance of disciplinary proceedings against commodity traders for violations of the Act and the issuance of press releases concerning such violations, defendants' alleged unconstitutional acts, were committed to defendants' control by §§ 9 and 12 of the Act. Moreover, plaintiffs admit in their second amended complaint that defendants' acts were connected to their duties under the Act. We conclude, therefore, that the individual defendants' acts were well within the scope of their authority.

Once defendants have established that their acts were authorized, they can qualify for official immunity by showing that the acts involved the exercise of discretion.[5] Authorized acts of discretion by governmental officials are immunized from suit so that such officials can make decisions while performing

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[3] *Barr* v. *Matteo*, 360 U.S. 564 (1959).

[4] *Spalding* v. *Vilas*, 161 U.S. 483 (1896). See also *Bivens* v. *Six Unknown Named Agents of the Federal Bureau of Narcotics*, 456 F.2d 1339 (2d Cir. 1972).

[5] *Barr* v. *Matteo*, *supra*.

their duties "without fear or threat of vexatious or fictitious suits or personal liability." [6]

We turn to an examination of each act of defendants alleged to be unconstitutional in light of these principles of law to determine if the act was discretionary and, therefore, warrants immunity.

Plaintiffs contend that defendants' decision to initiate disciplinary proceedings against them for violations of the Act without first issuing a warning letter was an unconstitutional ministerial act not entitled to immunity.

The undisputed facts are that the Secretary of Agriculture, after examining a Commodity Exchange Authority audit of ANE, Inc., exercised his judgment and concluded that plaintiffs had wilfully violated the Act. He, therefore, took immediate action against plaintiffs without first issuing a warning letter.

The Secretary, in deciding whether to initiate proceedings against plaintiffs, was in a position analogous to that of a prosecutor in deciding whether to bring criminal proceedings against a defendant. Courts have uniformly held that the decision whether to prosecute a defendant is discretionary because it involves the evaluation of evidence and the exercise of judgment.[7] Since the Secretary evaluated the evidence against plaintiffs and exercised his judgment

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[6] *Ove Gustavsson Contracting Co.* v. *Floete*, 299 F.2d 655, 659 (2d Cir. 1962), *cert. denied*, 374 U.S. 827 (1963).

[7] *Inmates of Attica Correctional Facility* v. *Rockefeller*, 477 F.2d 375 (2d Cir. 1973).

prior to proceeding against them, there can be no doubt that his decision was discretionary and entitled to immunity.[8]

Plaintiffs next contend that defendants' decision to continue disciplinary proceedings against them after they had withdrawn from doing business as futures commission merchants under the Act was a ministerial act which deprived plaintiffs of their constitutional rights. Defendants contend that they interpreted the Act to require them to complete proceedings against plaintiffs in order to prevent them from obtaining a new license in the future.

In an analogous situation, it has been held that, even though a securities broker-dealer had withdrawn from doing business under the securities laws, the SEC's decision to bring public proceedings against it was a discretionary act involving the SEC's interpretation of the securities laws which it was charged with enforcing and would not be upset by the court.[9]

Since defendants' decision to continue with the proceedings involved discretionary interpretation of the

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[8] The court, in *Economou* v. *U.S. Dep't of Agriculture*, 494 F.2d 519 (2d Cir. 1974), held that the Secretary of Agriculture should have issued a warning letter to plaintiffs ANE and ANE, Inc. before filing a complaint against them because his conclusion that plaintiffs had wilfully violated the Act was not warranted from the record as a whole. We have held that the Secretary's decision not to issue a warning letter was within the scope of his authority and discretionary. As such, it is still entitled to immunity even though it has been held to be incorrect. *Boruski* v. *Stewart*, 381 F. Supp. 529 (S.D. N.Y. 1974).

[9] *M. G. Davis & Co.* v. *Cohen*, 369 F.2d 360 (2d Cir. 1966).

Act which they were charged with enforcing, the decision is entitled to immunity.

The third act by defendants which plaintiffs claim is ministerial is the issuance of several press releases allegedly containing false and misleading information about plaintiffs while defendants were proceeding against them under the Act. The issuance of press releases by governmental officials concerning administrative enforcement proceedings is a discretionary act entitled to immunity.[10]

Since the individual defendants have shown that their alleged unconstitutional acts were both within the scope of their authority and discretionary, we dismiss the second amended complaint as to them.

Accordingly, we grant defendants' motion, pursuant to Rule 12(b), Fed.R.Civ.P., to dismiss the second amended complaint as to all defendants. SO ORDERED.

Dated: New York, N. Y.
May 22, 1975

/s/ Lloyd F. MacMahon
LLOYD F. MACMAHON
United States District Judge

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[10] *Barr* v. *Matteo, supra; Federal Trade Comm'n* v. *Cinderella Career & Finishing Schools, Inc.*, 404 F.2d 1308 (D.C. Cir. 1968).

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-third day of April one thousand nine hundred and seventy-six.

Present: HON. WALTER R. MANSFIELD
HON. WILLIAM H. TIMBERS
HON. THOMAS J. MESKILL
Circuit Judges

75-6050

ARTHUR N. ECONOMOU, PLAINTIFF-APPELLANT

v.

UNITED STATES DEPARTMENT OF AGRICULTURE, EARL L. BUTZ, Secretary of Agriculture, RICHARD T. LYNG, Assistant Secretary of Agriculture, COMMODITY EXCHANGE AUTHORITY, ALEX C. CALDWELL, Act Administrator, Commodity Exchange Authority, CHARLES E. ROBINSON, Director, Compliance Division, Commodity Exchange Authority, RICHARD E. KIRCHOFF, Deputy Director, Registration and Audit Division, Commodity Exchange Authority, JACK W. BAIN, Chief Hearing Examiner, United States Department of Agriculture, RICHARD W. DAVIS, JR., Counsel, United States Department of Agriculture, REED MCMINN, Regional Ad-

ministrator, New York Regional Office, Commodity Exchange Authority, CLEMENT GROSS, Auditor, Commodity Exchange Authority, MURRAY A. WOLKIS, Auditor, Commodity Exchange Authority, EDWARD FITZPATRICK, Auditor, Commodity Exchange Authority, DEFENDANT-APPELLEES

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is affirmed in part and reversed in part and that the action be and it hereby is remanded to said District Court for further proceedings consistent with the opinion of this court.

A. DANIEL FUSARO
Clerk

By /s/ Vincent A. Carlen
Chief Deputy Clerk

APPENDIX D

UNITED STATES COURT OF APPEALS SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 23rd day of July, one thousand nine hundred and seventy-six.

Present:

HON. WALTER R. MANSFIELD,
HON. WILLIAM H. TIMBERS,
HON. THOMAS J. MESKILL,
Circuit Judges.

[Filed Jul. 23, 1976, United States Court of Appeals, Second Circuit, A. Daniel Fusaro, Clerk]

Docket No. 75-6050

ARTHUR N. ECONOMOU, PLAINTIFF-APPELLANT

v.

UNITED STATES DEPARTMENT OF AGRICULTURE; EARL L. BUTZ, Secretary of Agriculture, etc., DEFENDANTS-APPELLEES

A petition for a rehearing having been filed herein by counsel for the defendant-appellees, U.S. Dept. of Agriculture, etc.

Upon consideration thereof, it is

Ordered that said petition be and hereby is denied.

/s/ A. Daniel Fusaro
A. DANIEL FUSARO

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 23rd day of July, one thousand nine hundred and seventy-six.

[Filed Jul. 23, 1976, United States Court of Appeals, Second Circuit, A. Daniel Fusaro, Clerk]

Docket No. 75-6050

ARTHUR N. ECONOMOU, PLAINTIFF-APPELLANT

v.

UNITED STATES DEPARTMENT OF AGRICULTURE; EARL L. BUTZ, Secretary of Agriculture, etc., DEFENDANTS-APPELLEES

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the defendant-appellees, and no active judge or judge who was a member of the panel having requested that a vote be taken on said suggestion,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

/s/ Irving R. Kaufman
IRVING R. KAUFMAN
Chief Judge

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